

**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER: 99-0171**

**Withholding Tax  
Calendar Years 1995, and 1996**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUE(S)**

**I. Withholding Tax – Liability of Employer**

**Authority:** IC 6-3-4-13; 45 IAC 3.1-1-109

Taxpayer protests the tax assessed.

**II. Tax Administration – Interest**

**Authority:** IC 6-8.1-10-1

Taxpayer protests the interest assessed.

**III. Tax Administration – Penalty**

**Authority:** IC 6-8.1-10-2.1

Taxpayer protests the penalty assessed.

**STATEMENT OF FACTS**

Taxpayer was assessed withholding tax for its nonresident shareholder after it was notified by the Department of its obligation to withhold adjusted gross income tax on distributions. Neither response nor filing was forthcoming; therefore the department issued its investigative billing for 1995 and 1996 based upon the corporate tax filing. A Subchapter S corporation is required to withhold state income tax at the rate of 3.4 percent on the amount it pays or credits to any of its nonresident and part-year

nonresident individual shareholders as dividends or as their share of the corporation's undistributed taxable income.

The corporation is required to issue a WH-18 to nonresident shareholders showing the distribution and amount of state and county tax withheld. A copy of the WH-18 should be submitted to the Department of Revenue with Form WH-3 (Annual Withholding Reconciliation) by the end of February following the close of the calendar year. Taxpayer is required to withhold Indiana adjusted gross income tax on distributions to all nonresident shareholders regardless of their individual filing requirement and status under IC 6-3-4-13.

The investigation adjusted withholding tax for payments made to a nonresident shareholder that filed no returns in Indiana.

### **ISSUE**

#### **I. Withholding Tax – Liability of Employer**

### **DISCUSSION**

Taxpayer failed to withhold tax from a nonresident shareholder's distribution.

Taxpayer's only argument is that the IRS audited the shareholder for 1996 and reduced its income by \$18,988. In addition, the shareholder reported the income to Illinois as flow through income from an S-Corporation and only excluded filing with Indiana assuming that reciprocity between Indiana and Illinois superceded the need to file a personal return and the accompanying withholding in Indiana.

IC 6-3-4-13 (a) states:

Every corporation which is exempt from tax under IC 6-3 pursuant to IC 6-3-2-2.8(2) shall, at the time that it pays or credits amounts to any of its nonresident shareholders as dividends or as their share of the corporation's undistributed taxable income, deduct and retain therefrom the amount prescribed in the withholding instructions referred to in section 8 of this chapter. Such corporation so paying or crediting any nonresident shareholder:

- (1) shall be liable to the state of Indiana for the payment of tax required to be deducted and retained under this section and shall not be liable to such shareholder for the amount deducted from such payment or credit and paid over in compliance or intended compliance with this section; and

- (2) shall make return of and payment to the department monthly whenever the amount of tax due under IC 6-3 and IC 6-3.5 exceeds an aggregate amount of fifty dollars (\$50) per month with such payment due on the thirtieth day of the following month, unless an earlier date is specified by section 8.1 of this chapter.

Taxpayer assumed that reciprocity between Indiana and Illinois superceded the need to file a personal return and the accompanying withholding in Indiana, however, 45 IAC 3.1-1-115 states that Indiana will not impose its adjusted gross income tax on salaries, wages and commissions earned by legal residents of these states in Indiana and they in turn will not impose their individual income tax on wages, salaries and commissions earned by legal residents of Indiana in those states. Corporate distributions, whether distributed or undistributed, however, do not fall under salaries, wages, and commissions subject to withholding under 45 IAC 3.1-1-109.

The auditor assessed tax to the S Corporation for distributions to a nonresident shareholder that filed no returns.

#### **FINDING**

Taxpayer's protest is denied.

#### **ISSUE**

### **II. Tax Administration – Interest**

Taxpayer protests the imposition of interest.

#### **DISCUSSION**

The department has no authority to waive interest.

#### **FINDING**

Taxpayer's protest is denied.

#### **ISSUE**

### **III. Tax Administration – Penalty**

Taxpayer protests the imposition of penalty.

### **DISCUSSION**

In its letter dated April 23, 1999 taxpayer requests that the department waive the penalty charged on the modified liability. The liability is not modified, the taxpayer has not provided reasonable cause for failing to file its WH-18, and failed to respond to the department's request for the preparation of a return. The department prepared the returns that are subject to penalty under IC 6-8.1-10-3.

### **FINDING**

Taxpayer's protest is denied.

### **CONCLUSION**

Taxpayer's protest is denied for Issues I, II, and III.